



**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 920**

[Doc. No. AMS-FV-11-0041; FV11-920-1 FR]

**Kiwifruit Grown in California; Change in Reporting Requirements and New Information Collection**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final Rule.

**SUMMARY:** This rule changes the reporting requirements currently prescribed under the marketing order that regulates the handling of kiwifruit grown in California. The order is administered locally by the Kiwifruit Administrative Committee (Committee). This rule requires handlers to file two new end-of-season reports with the Committee. One report contains price and handler shipment information and the other report contains grower shipment information. The Committee uses this information to determine appropriate grower representation on the Committee, to conduct grower nominations, to verify shipments for assessment collections, and to prepare the annual report and the annual marketing policy, as required under the order.

**EFFECTIVE DATE:** December 24, 2011.

**FOR FURTHER INFORMATION CONTACT:** Kathie M. Notoro, Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906, or E-mail: Kathie.Notoro@ams.usda.gov or Kurt.Kimmel@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order and Agreement Division, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Laurel.May@ams.usda.gov.

**SUPPLEMENTARY INFORMATION:** This final rule is issued under Marketing Order No. 920 as amended (7 CFR part 920), regulating the handling of kiwifruit grown in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule adds two new reporting requirements and two new forms to those currently specified in the order's administrative rules and regulations. These changes allow the Committee to collect annual, end-of-season price, shipment, and grower information (grower entity/farm name,

mailing address, location of farm by county, shipments by pack style, and acreage) from all kiwifruit handlers. Under this regulation, both reports are due from each handler within 30 days after such handler has completed current season shipments. The Committee will use this information to determine appropriate grower representation on the Committee, to conduct grower nominations, to verify shipments for assessment collections, and to prepare the annual report and the annual marketing policy, as required under the order. This rule was unanimously recommended by the Committee at a meeting on March 17, 2011.

Section 920.12 of the order defines the Districts within the production area, and Section 920.20 provides, in part, that "...district representation on the committee shall be based upon the previous five-year average production in the district and shall be established so as to provide an equitable relationship between membership and districts."

Section 920.22 of the order defines the nomination procedures, allowing for nominations to be conducted via mail, and provides that growers are eligible to participate in nominations in the district they produce kiwifruit.

Section 920.34 of the order requires that the Committee prepare an annual report for presentation to the Secretary

and the industry. The annual report provides a cumulative review of industry statistics as well as information about program activities and expenditures.

Section 920.41 of the order provides authority to assess each person who first handles kiwifruit a pro rata share of the expenses which are reasonable and likely to be incurred by the Committee during a fiscal period.

Section 920.50 of the order requires the Committee to prepare an annual marketing policy for submission to the Secretary. The marketing policy describes expected kiwifruit production, quality, and marketing conditions. Along with other pertinent information, the marketing policy provides the basis for the recommendation of appropriate kiwifruit handling regulations for the upcoming season.

Section 920.60 of the order authorizes the Committee to require handlers to file reports and provide other information as may be necessary for the Committee to perform these duties.

Section 920.61 (Compliance) of the order provides that all handlers must conform to the provisions and regulations set forth in the order, and the Committee is to verify handler compliance with order provisions.

The Committee's current reporting requirements are specified in § 920.160 of the order's administrative rules and regulations. This section currently requires that handlers submit: 1) a report of shipment and inventory data which provides monthly data regarding the reporting period, name and identification of the shipper, and the number of containers by type and weight by shipment destination category of all kiwifruit; 2) a Kiwifruit Inventory Shipping System (KISS) form, which consists of three sections: KISS/Add Inventory, KISS/Deduct Inventory, and KISS/Shipment and which provides beginning inventory by size and container type, quantity of the fruit lost in repack or repacked into other container types, total domestic and export shipments by size and container type; and any other adjustments which increase or decrease handler inventory; 3) a Return Receipt of Kiwifruit to Grower Form which reports fruit returned by a handler to a grower(s); and 4) a KISS Price/Shipment report which contains handler information, reporting period, total fresh market shipments, and gross f.o.b. sales of non-organic kiwifruit by pack style and size.

Since 1984, the California Kiwifruit Commission (Commission) has collected end-of-season price, shipment, and grower information (grower entity/farm name, mailing address,

location of farm by county, shipments by pack style, and acreage), on organic and non-organic kiwifruit via two Commission forms. The Commission has, through an agreement, shared this information with the Committee. The Committee previously used the majority of this information to determine appropriate grower representation on the Committee, to conduct grower nominations, to verify shipments for assessment collections, and to prepare the annual report and the annual marketing policy under the order.

The Commission ceased to exist as of September 30, 2011. Thus, the Committee no longer has access to this previously shared information. As the current reporting requirements under the order make no provisions for collecting end-of-season information previously provided by the Commission, and as the Committee would need this information from all handlers, including organic handlers, the Committee unanimously recommended adding these new reporting requirements and two new forms, the End-of-Season F.O.B. Sales Report and the Final Packout Report, to § 920.160 of the order's administrative rules and regulations.

Under this final rule, § 920.160 is revised by adding two new reporting requirements and two new forms, due by each handler (organic and non-organic) within 30 days after such

handler has completed current season shipments. Kiwifruit shipments generally begin in September and continue through July. The information collected on the End-of-Season F.O.B. Sales Report includes data on gross f.o.b. sales value and number of containers for fresh market shipments by fruit size and pack style for the season. The information collected on the Final Packout Report includes containers shipped by pack style for fresh market shipments, for each grower entity during the season. The report also includes the grower entity and farm name, mailing address, the county where the farm is located, and total acreage. Both reports also show the company name, contact person, and phone number of the handler. The information obtained from both of the two new reports provides data to determine appropriate representation on the Committee, to conduct grower nominations, to verify shipments for assessment collections, and to prepare the annual report and annual marketing policy.

Section 8e of the Act provides that when certain domestically produced commodities, including kiwifruit, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. This rule only changes the reporting requirements under the domestic handling



regulations. No changes to the import regulations will be made.

### **Final Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000.

Based on Committee data, there are approximately 27 handlers of kiwifruit subject to regulation under the

marketing order and approximately 176 kiwifruit growers in the production area.

The California Agricultural Statistical Service (CASS) reported total California kiwifruit production for the 2010-11 season at 32,700 tons with an average price of \$768 per ton. Based on the average price, shipment, and grower information provided by the CASS and the Committee, it could be concluded that the majority of kiwifruit handlers would be considered small businesses under the SBA definition. In addition, based on kiwifruit production and price information, as well as the total number of California kiwifruit growers, the average annual grower revenue is less than \$750,000. Thus, the majority of California kiwifruit producers may also be classified as small entities.

This final rule changes the reporting requirements currently prescribed under the order. This rule revises § 920.160 by adding two new reporting requirements and two new forms, due by handlers within 30 days after such handler has completed current season shipments. The information collected on the End-of-Season F.O.B. Sales Report includes data on gross f.o.b. sales value and number of containers for fresh market shipments by fruit size and pack style for the season. The information collected on the Final Packout

Report includes containers shipped by pack style for fresh market shipments, for each grower entity during the season. The report also includes the grower entity and farm name, mailing address, the county where the farm is located, and total acreage. Both reports also show the company name, contact person, and phone number of the handler. The information obtained from both of the two new reports provides data to determine appropriate grower representation on the Committee, to conduct grower nominations, to verify shipments for assessment collections, and to prepare the annual report and annual marketing policy. This final rule revises § 920.160, which specifies the reporting requirements.

Requiring the price, shipment, and grower information at the end of the season imposes a minor increase in the reporting burden on all kiwifruit handlers. As this data was previously provided to the Commission and shared with the Committee, these two annual end-of-season reports do not significantly increase the handlers' record keeping burden because the primary source of data was already being recorded and maintained by handlers as a routine part of their daily business. The majority of handlers use computers to record their data, and this information can readily be accessed and

summarized for these reports. Consequently, any additional costs associated with these changes are expected to be minimal. Also, the benefits of having consolidated end-of-season price, shipping, and grower data are expected to outweigh any costs associated with the increase in reporting burden. Further, the benefits of this rule are expected to be equally available to all industry members, regardless of their size. It is anticipated that the transmission of these reports from handlers to the Committee will be done by either e-mail or facsimile (FAX) machines.

The Committee discussed alternatives to this action, including making no changes to the reporting requirements, but determined that in order to carry out the objectives of the marketing order, the information collected contained within these two new reports is necessary. Therefore, this alternative was rejected.

This final rule imposes additional reporting burdens on handlers of kiwifruit in California. This action requires two new Committee forms: the End-of-Season F.O.B. Sales Report and the Final Packout Report. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

## **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0189, Generic OMB Fruit Crops. As a result of this action, two new Committee forms would be created. They have been submitted to OMB for review.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Further, the Committee's meetings were widely publicized throughout the kiwifruit industry and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the March 17, 2011, meeting was a public meeting

and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on August 9, 2011 (76 FR 48742). Copies of the rule were mailed or sent via facsimile to all Committee members and kiwifruit handlers. Finally, the rule was made available through the Internet by USDA and the Office of the Federal Register. A 60-day comment period ending October 11, 2011, was provided to allow interested persons to respond to the proposal. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at:

[www.ams.usda.gov/MarketingOrdersSmallBusinessGuide](http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide). Any questions about the compliance guide should be sent to Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because the Committee requires time to prepare and mail handler report packets, which should include the End-of-Season F.O.B. Sales Report and the Final Packout Report, prior to the beginning of shipments for the 2011-12 crop year. In addition, handlers are aware of this rule, which was recommended at a Committee meeting on March 17, 2011. Also, a 60-day comment period was provided in the proposed rule.

**List of Subjects in 7 CFR Part 920**

Kiwifruit, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 920 is amended as follows:

**PART 920 - KIWIFRUIT GROWN IN CALIFORNIA**

1. The authority citation for 7 CFR part 920 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Section 920.160 is amended by adding paragraphs (f) and (g) to read as follows:

§ 920.160 Reports.

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(f) Each handler shall file annually with the Committee an End-of-Season F.O.B. Sales Report, due within 30 days after such handler has completed current season shipments, reporting gross f.o.b. sales value and number of containers by pack style and size for fresh market shipments for the season. The report shall also show the company name, contact person, and phone number of the handler.

(g) Each handler shall file annually with the Committee a Final Packout Report, due within 30 days after such handler has completed current season shipments, reporting total containers shipped, by pack style for fresh market shipments, for each grower entity during the season. The report shall also include the grower entity and farm name, mailing address, the county in which the farm is located, and total



acreage for each reported grower entity. Also, the report shall show the company name, contact person, and phone number of the handler.

Dated: December 14, 2011

David R. Shipman  
Acting Administrator  
Agricultural Marketing Service

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